

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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**LARRY G. PHILPOT,
Plaintiff,**

v.

Civil Action No. 1:20-cv-4307

**COUNTER PRODUCTIONS, INC.,
MICHAEL L. JONES a/k/a “MICK
JONES,” and JOHN OR JANE DOES 1
THROUGH 5,**

Defendants.

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PLAINTIFF’S ORIGINAL COMPLAINT AND JURY DEMAND

Plaintiff Larry G. Philpot (“Philpot” or “Plaintiff”) files this Original Complaint and Jury Demand against Defendants Counter Productions, Inc. (“Counter Productions”), Michael L. Jones a/k/a “Mick Jones” (“Jones”) and John or Jane Does 1 through 5 (“Does”) (Counter Production and Does, collectively, “Defendants”) on personal knowledge as to all facts regarding himself and on information and belief as to all other matters, as follows:

I.

PRELIMINARY STATEMENT

A professional photographer’s ability to envision, and then immediately capture the entire scene—including non-visuals such as emotions—is what differentiates their photographs from an amateur’s photographs. These works extend well beyond the four corners of the photograph to evoke sentiments within the viewer so that the viewer is forever a part of the moment captured in time. For concert photographers, the odds are almost always against them—the musicians are

constantly moving, the lighting is usually dark and typically changing, and it is practically impossible to secure a good vantage point. But every now and then, a photographer captures a great shot, the kind of iconic shot that makes the viewer forever a part of that very moment in time.

Larry Philpot, an experienced freelance photographer, has honed the art of capturing these rare moments in time. Philpot created photographs of Kelly Hansen and Mick Jones of the band Foreigner during a concert. These photographs are the type of awe-inspiring works that launch a successful photography career.

Defendants copied and posted Philpot's photographs of Kelly Hansen and Mick Jones onto Foreigner's Facebook page, thereby infringing on Philpot's copyrighted work. Larry Philpot brings this action to protect not just his rights under copyright law, but also his photography business.

II.

PARTIES

A. Plaintiff

1. Plaintiff Larry G. Philpot is a citizen and resident of the State of Indiana. Philpot is a renowned freelance professional photographer who specializes in photographing concerts and musical performances across the United States.

B. Defendants

2. Defendant Counter Productions, Inc. is a New York corporation with its principal place of business in New York and resides in New York County. Counter Productions, Inc. may be served via its registered agent, C T Corporation System, 155 Federal Street, Suite 700, Boston, Massachusetts 02110.

3. Defendant Michael L. Jones a/k/a "Mick Jones" is a Florida resident with continuous and systematic contacts with the State of New York. Jones conducts business in the

State of New York. Jones conducts business under the name “Foreigner,” which he has registered as a trademark with the United States Patent and Trademark Office. Jones is the President of Counter Productions.

4. Defendants John or Jane Doe 1 through 5 are currently unknown individual, individuals, entity, or entities who assisted Defendants Counter Productions and Jones in the publication or display of Larry Philpot’s copyrighted works on the Foreigner Facebook page. Plaintiff will amend his complaint to include the actual names of John or Janes Does 1 through 5 upon learning of them in discovery.

III.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this civil action presents a federal question as Plaintiff presents a civil claim arising under the Constitution, laws, or treaties of the United States.

6. This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1338(a) because this civil action arises under an Act of Congress relating to copyrights, namely the Copyright Act of the United States, 17 U.S.C. § 101, et seq.

7. This Court has personal jurisdiction over Defendant Counter Productions, Inc. because it is a New York corporation, conducts business in the State of New York, and resides in the State of New York.

8. This Court has personal jurisdiction over Defendant Michael L. Jones a/k/a “Mick Jones” because he has continuous and systematic contacts with the State of New York and conducts business in the State of New York.

9. This Court has personal jurisdiction over Defendants John or Jane Does 1 through 5 because they conduct business in the State of New York.

10. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and 1400(a) because Defendant Counter Productions, Inc. resides and may be found in this District.

IV.

FACTUAL BACKGROUND

A. The Highly Competitive World of Freelance Concert Photography

11. To say that concert photography is a tough business is a severe understatement. It requires artistic skills, business skills, and interpersonal skills. Before having the opportunity to even take a photo, concert photographers must invest in expensive equipment and negotiate to obtain access to the concert stage. At the concert, they must battle all the variables that arise from an uncontrolled setting—a rowdy crowd, horrible lighting that is always changing, and musicians constantly moving. Not to mention, it is really loud. As a result, despite all of their efforts and hard work, concert photographers often take photographs that are entirely unusable, where the rock stars appear as blurs and washy blobs.

12. Financially, concert photography can be a high-risk business venture. Freelance concert photographers earn money when they license or sell their work product and from photography engagements. If the photographs are unusable, which is often the case, or simply aren't good, then the photographers do not receive any type of payment and are unable to expand their portfolio—which is necessary to obtain additional business.

13. And, in today's technological age where anyone with a smart phone can take pictures at concerts, concert photography is becoming significantly more competitive, making it even more imperative to capture the perfect shot. Because that is all that there is demand for—a few once-in-a-lifetime shots for each star. It doesn't matter if a concert photographer takes 100 good shots of a star at a concert—an article about Jeff Tweedy, for example, only needs one picture of Jeff Tweedy—the best one.

14. In such a cutthroat environment, it is essential that concert photographers receive the compensation to which they are entitled, but also need to advance their business.

B. Larry Philpot: A Professional Concert Photographer

15. Larry Philpot is a renowned freelance photographer who specializes in taking photographs of musicians at concerts and other performances. Philpot has distinguished himself from amateur photographers by creating a highly coveted portfolio that demands legal protection to preserve its standard.

16. He has spent years perfecting his craft, and his photography business includes licensing his works and photography engagements.

17. Philpot is known for the unparalleled quality of his work. He employs photography techniques that involve precise angles, timing, assessment of light, and other creative approaches that he has worked tirelessly to develop. At a concert, Philpot has the uncanny ability of connecting with the artist from the crowd. In addition, to ensure the highest quality photographs, Philpot uses state of the art equipment. He has invested tens of thousands of dollars in equipment.

18. He has established a strong reputation for himself and his work, and due to his professional reputation, he often obtains privileged access to take photographs of musical performers at concerts. Indeed, there are over one hundred instances where Philpot has received press credentials.

19. There is an extensive market and a demand for Philpot's photos that includes, but is not limited to, the musicians themselves, the musicians' fans, record labels, talent agencies, editorial organizations, media entities, radio stations, website operators, and concert and event planners. Philpot has been very successful in this market.

20. Philpot understands that part of being a professional photographer is to market your works to gain widespread exposure, and that the high use of his photographs has required licensing agreements and copyright protections.

21. Philpot has entered into license agreements with Tom Petty and the Heartbreakers for his photographs.

22. Philpot has also licensed his work to various musicians in exchange for attribution including, but not limited to, the musicians Kid Rock and Paul Stanley of KISS.

23. Further, Philpot has previously licensed several of his photographs through a stock photography agency called “Corbis” and its affiliate “Splash.” Philpot received monetary compensation through Corbis and Splash for licenses for photographs he took of Prince, Madonna, Fleetwood Mac, and the 2015 Indianapolis 500 Race and Winner.

24. Philpot has also been engaged as a photographer by Hoosier Park LLC d/b/a Hoosier Park Racing & Casino to photograph “meet and greets” between celebrities and fans.

C. Philpot Creates the Kelly Hansen and Mick Jones Photographs

25. Philpot created photographs of Kelly Hansen (the “Kelly Hansen Photo”) and Mick Jones (the “Mick Jones Photo”), both members of the rock band “Foreigner,” during a concert in Cincinnati, Ohio. A true and correct copy of the Kelly Hansen Photo is attached as Exhibit A. A true and correct copy of the Mick Jones Photo is attached as Exhibit B.

26. The Kelly Hansen and Mick Jones Photos are original works that Philpot registered with the United States Copyright Office as part of a collection of photographs on July 7, 2014. The Kelly Hansen and Mick Jones Photos are registered with the United States Copyright Office under Certificate Number VAu 1-177-960. A copy of this copyright registration certificate is attached as Exhibit C.

27. As the owner of the copyrights in the Kelly Hansen and Mick Jones Photos, Philpot has the exclusive rights to (1) reproduce the Kelly Hansen and Mick Jones Photos in copies, (2) prepare derivative works based on the Kelly Hansen and Mick Jones Photos, (3) distribute copies of the Kelly Hansen and Mick Jones Photos to the public by sale or other transfer of ownership, or by rental, lease, or lending, and (4) display the Kelly Hansen and Mick Jones Photos publicly.

D. Defendants Infringe Philpot's Copyrights in the Kelly Hansen and Mick Jones Photos.

28. Under information and belief, Counter Productions markets the rock band "Foreigner." Foreigner's website located at www.foreigneronline.com, which is registered to Counter Productions.

29. Under information and belief, Counter Productions and Jones operate the Facebook page for the band "Foreigner" located at www.facebook.com/Foreigner (the "Foreigner Facebook Page"). Both the Foreigner Facebook Page and the Foreigner website, www.foreigneronline.com, link to each other.

30. Defendants infringed Philpot's copyrights in the Kelly Hansen and Mick Jones Photos by publishing, copying, and displaying the Kelly Hansen and Mick Jones Photos on the Foreigner Facebook page on July 24, 2014 at <https://www.facebook.com/Foreigner/photos/a.10154468473710595.1073741849.197585835594/10154468506440595/?type=3&theater>. A copy of this webpage as it appeared with the Kelly Hansen and Mick Jones Photos is attached as Exhibit D.

31. Philpot discovered these infringements on June 5, 2017.

E. The Damage Done

32. Defendants infringed Philpot's copyrights in the Kelly Hansen and Mick Jones Photos for a commercial purpose—to promote Counter Productions' band, Foreigner, on Facebook. However, Defendants did not pay Philpot for a license to use his copyrighted works.

V.

CLAIMS

A. Count One: Copyright Infringement

33. Plaintiff realleges and incorporates the allegations set forth in the preceding paragraphs as if set forth in full herein.

34. Defendants operated and operates the Foreigner Facebook Page at www.facebook.com/Foreigner.

35. Defendants published, copied, and displayed the Kelly Hansen and Mick Jones Photos at <https://www.facebook.com/Foreigner/photos/a.10154468473710595.1073741849.197585835594/10154468506440595/?type=3&theater>.

36. Defendants' acts are and were performed without the permission, license, or consent of Plaintiff.

37. Defendants acted with willful disregard of the laws protecting Plaintiff's copyrights.

38. Defendants infringed Plaintiff's copyrights in the Kelly Hansen and Mick Jones Photos in violation of 17 U.S.C. § 501.

39. Plaintiff has sustained and will continue to sustain substantial damage in an amount not yet fully ascertainable, including but not limited to damage to his business reputation and goodwill.

40. Plaintiff is informed and believes and thereon alleges that the Defendants have obtained profits recoverable under 17 U.S.C. § 504. Plaintiff will require an accounting from the Defendants of all monies generated from the Kelly Hansen and Mick Jones Photos.

41. In the alternative and at his election, Plaintiff is entitled to seek maximum statutory damages for each work willfully infringed by Defendants in an amount of \$150,000 per work infringed. In the event that the trier of fact does not find that Defendants willfully infringed Plaintiff's copyrights, Plaintiff is entitled to seek maximum statutory damages for each work infringed by Defendants in an amount of \$30,000 per work infringed.

42. Plaintiff has suffered and continues to suffer irreparable harm and damage as a result of the above-described acts. Accordingly, Plaintiff seeks permanent injunctive relief pursuant to 17 U.S.C. § 502, as well as seizure of the Kelly Hansen and Mick Jones Photos.

43. Plaintiff is entitled to recover from the Defendants his attorney's fees and costs of suit, pursuant to 17 U.S.C. § 505.

VI.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

VII.

RELIEF REQUESTED

WHEREFORE, Plaintiff demands that judgment be entered against Defendants as follows:

1. Pursuant to 17 U.S.C. § 502, that Defendants, their agents, servants, employees, representatives, successors and assigns, and all persons, firms, corporations, or other entities in active concert or participation with Defendants, be permanently enjoined from directly or indirectly infringing the Plaintiff's copyrights in any manner, including generally, but not limited to reproducing, distributing, displaying, performing or making derivatives of the Kelly Hansen and Mick Jones Photos;

2. Pursuant to 17 U.S.C. § 504, that Defendants be required to pay actual damages and disgorgement of all profits derived by Defendants from their acts of copyright infringement;

3. That Defendants be required to perform a complete and full accounting of all profits generated by Defendants from the Kelly Hansen and Mick Jones Photos;
4. Pursuant to 17 U.S.C. § 504, that upon Plaintiff's election, Defendants be required to pay statutory damages up to \$150,000 for each work infringed for their acts of copyright infringement, and in the event the factfinder determines that Defendants' infringement was not willful, that Defendants be required to pay statutory damages up to \$30,000 for each work infringed for their acts of copyright infringement;
5. Pursuant to 17 U.S.C. § 505, Defendants be required to pay Plaintiff the costs of this action, prejudgment interest, and reasonable attorney's fees; and
6. Plaintiff be granted all other and further relief to which he is entitled.

Dated: June 5, 2020

Respectfully submitted,

HUTCHERSON LAW PLLC

/s/ Kenton J. Hutcherson
Kenton J. Hutcherson, Esq.
Pro Hac Vice Pending
Texas State Bar No. 24050798
Hutcherson Law PLLC
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ATTORNEY FOR PLAINTIFF

EXHIBIT A



EXHIBIT B



EXHIBIT C

Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

A handwritten signature in black ink that reads "Maria A. Pallante".

Register of Copyrights, United States of America

Registration Number

VAU 1-177-960

Effective date of registration:

July 7, 2014

Title _____

Title of Work: 2Q2014 Photographs of Performers

Completion/Publication _____

Year of Completion: 2014

Author _____

■ **Author:** Larry Gene Philpot

Author Created: photograph(s)

Work made for hire: No

Citizen of: United States

Domiciled in: United States

Year Born: 1953

Copyright claimant _____

Copyright Claimant: Larry Gene Philpot

8125 Halyard Way, Indianapolis, IN 46236, United States

Rights and Permissions _____

Name: Larry Philpot

Telephone: 317-567-1338

Email: larry@behindthemusic.net

Address: 8125 Halyard Way

Indianapolis, IN 46236 United States

Certification _____

Name: Larry G. Philpot

Date: July 7, 2014

Registration #: VAU001177960

Service Request #: 1-1569661231



0000VAU0011779600101

Larry Gene Philpot
8125 Halyard Way
Indianapolis, IN 46236 United States

EXHIBIT D

Secure | <https://www.facebook.com/Foreigner/photos/a.10154468473710595.1073741849.197585835594/10154468519915595/?type=3&theater>



6/5 Photo by Larry Philpot

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39 Top Comments

Earlene Davenport Kelly you make all of us want walk on the wild side. You got our undivided attention and that is a good thing. Love you to pieces!!!!!! Like · Reply · September 6, 2014 at 10:38pm

Melony Birt I was there - crazy! 😊 Like · Reply · July 25, 2014 at 6:12pm

Nelly Coral wow 😊 Like · Reply · July 25, 2014 at 12:17am

Julie Altman My kind of crazy Kelly! 😊 Like · Reply · July 24, 2014 at 10:15pm

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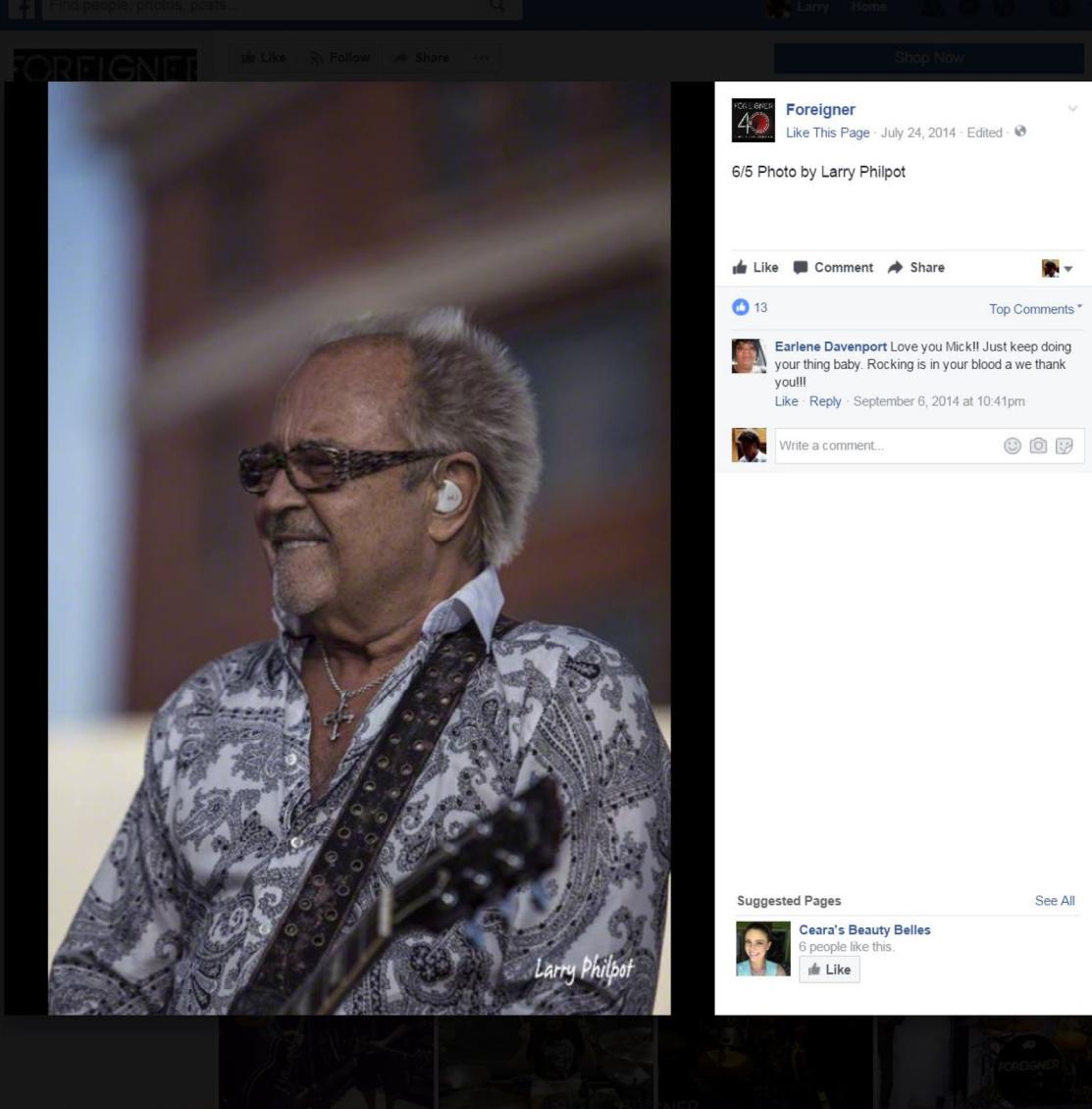
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FOREIGNER Like This Page · July 24, 2014 · Edited

6/5 Photo by Larry Philpot

Like Comment Share

13 Top Comments

Earlene Davenport Love you Mick!! Just keep doing your thing baby. Rocking is in your blood a we thank you!!

Like · Reply · September 6, 2014 at 10:41pm

Write a comment...

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Ceara's Beauty Belles 6 people like this.

Like

Chat (Off)

4:57 PM 6/5/2017